

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

EAST RIVER BAGEL INC. and C. GREEN
Respondents

Case No.: I-00-70227

FINAL ORDER

I. Introduction

On March 5, 2001, the Government served a Notice of Infraction upon Respondents East River Bagel, Inc. and C. Green, alleging that they violated 23 DCMR 3012.1, which requires operators of restaurants to “take all necessary precautions to keep the premises free from rats and vermin.” The Notice of Infraction alleged that the violation occurred on February 16, 2001 at 3839 Minnesota Avenue, N.E. and sought a fine of \$1,000.00.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Code § 6-2715). Accordingly, on April 2, 2001, this administrative court issued an order finding Respondents in default, assessing the statutory penalty of \$1,000.00 authorized by D.C. Code § 6-2704(a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

On April 6, 2001, Respondents filed an untimely plea of Admit with Explanation, together with a request for suspension or reduction of the fine proposed and the penalty assessed. On April 24, 2001, I issued an order permitting the Government to respond to that plea and request, and permitting Respondents to supplement the record with any additional supporting documents.¹ The Government filed its response on May 3, 2001. On the same day, Respondents submitted supplemental documentation in support of their plea and request.

II. Summary of the Evidence

Respondents state that they have been in business since 1995 and have used a pest control service since that time. They claim that their facility had always been free of rodents until September 2000, when a neighboring liquor store closed, leaving behind large piles of garbage that attracted mice and rats. Respondents have provided copies of invoices for pest control services and a copy of their plan to abate their rodent problem. They report that the garbage on the neighboring property was removed in April, and that the rodent problem has been eliminated. They state that they did not respond to the Notice of Infraction in a timely fashion because they believed that they simply could appear on the hearing date specified in the Notice of Infraction.

The Government acknowledges that Respondents undertook good faith efforts to take the necessary precautions to rid the premises of rodents. It objects to any suspension or reduction of the fine, however, arguing that Respondents are “ultimately responsible for keeping their establishment free from rodent infestation.” The Government states that it does not object to

¹ After the filing of Respondents’ plea, the Government served a second Notice of Infraction (No. 00-70229). The April 24 order dismissed that Notice as unnecessary in light of Respondents’ plea.

“suspension or reduction” of the statutory penalty for Respondents’ failure to respond to the Notice of Infraction.

III. Findings of Fact

1. By their plea of Admit with Explanation, Respondents have admitted violating 23 DCMR 3012.1 on February 16, 2001.
2. Respondents have acknowledged responsibility for their infraction.
3. There is no record evidence that Respondents have a prior history of violations.²
4. It is undisputed that Respondents have undertaken sustained, regular, good faith efforts to keep their facility free from rodents.
5. Respondents believed that they did not need to file an answer to the Notice of Infraction, but that they simply could appear on the scheduled hearing date. That belief, however, was unreasonable in light of the clear instructions on the Notice of Infraction, which state:

You are charged with violating the District of Columbia laws or regulations stated below. You MUST SIGN and RETURN this form WITHIN 15 DAYS of the date of service.

² Respondents have filed a copy of a Notice of Violation issued to their landlord by the Department of Public Works on October 31, 2000, alleging a violation of 21 DCMR 700.3 in connection with an overflowing dumpster at their property. Respondents state, however, that the Notice of Violation was dismissed when the inspector determined that they were not to blame for the condition of the dumpster. The Government does not dispute this assertion.

A separate section of the Notice of Infraction states:

WARNING: Failure to answer . . . each infraction on this Notice within 15 days of the date of service will result in the assessment of a penalty equal to and in addition to the specified amount of the fine.

6. Respondents filed their answer and plea four days after issuance of the default order in this case.

IV. Conclusions of Law

1. Based upon their plea, Respondents violated 23 DCMR 3012.1 on February 16, 2001.
2. A fine of \$1,000.00 is authorized for violations of 23 DCMR 3012.1. *See* 16 DCMR 3216.1(i) as added by §910(b) of the Rodent Control Act of 2000, Title IX of the Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172. *See* 47 D.C. Reg. 8692 (November 10, 2000); 47 D.C. Reg. 6308 (August 11, 2000).
3. Notwithstanding the opposition of the Government, there are substantial grounds for reducing the fine in this case. Respondents have accepted responsibility for the violation. Moreover, even the Government acknowledges that Respondents undertook good faith efforts to comply with the rule and the unrefuted evidence establishes that those efforts were successful over the years until the closing of the liquor store. Respondents have corrected the violation and there is no evidence of

a previous history of violations. Accordingly, the fine will be reduced to \$250.00 *See* D.C. Code § 6-2703(b)(6).

4. The Civil Infractions Act, D.C. Code §§ 6-2712(f) and 6-2715, requires the recipient of a Notice of Infraction to demonstrate “good cause” for failing to answer it within twenty days of the date of service by mail. If a party can not make such a showing, it is subject to a penalty equal to the amount of the proposed fine. D.C. Code §§ 6-2704(a)(2)(A), 6-2712(f). Respondents’ belief that they did not need to file a response was unreasonable and contrary to the explicit instructions on the Notice of Infraction. Accordingly, it does not constitute good cause for their failure to answer on time.
5. The Government, however, states that it does not oppose “suspension or reduction” of the penalty for Respondents’ untimely answer, although it does not specify any grounds for its position. “Suspension” and “reduction” are distinct concepts. “Suspension” means the total elimination of a Respondent’s obligation to pay a fine or a penalty, while “reduction” means that the Respondent must pay some amount less than the full fine or penalty authorized by law. Absent the Government’s consent, there would be no basis for reducing or suspending the penalty in this matter. Because Respondents’ reasons for not filing a timely answer are so clearly insufficient to constitute good cause, suspension of the penalty is not appropriate without unambiguous consent from the Government, accompanied by a statement justifying suspension. The Government’s consent does justify a reduction of the penalty, however, in light of Respondents’ prompt

filing of an answer when their mistake was called to their attention by the default order.³ Accordingly, the statutory penalty will be reduced to \$500.00.

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Respondents, who are jointly and severally liable, shall pay a total of **SEVEN HUNDRED FIFTY DOLLARS (\$750.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

³ Although the Government has not stated the reasons for its consent to a suspension or reduction of the penalty, there is no evidence that it is acting in an arbitrary or capricious manner. In future cases, the better practice would be for the Government briefly to state its reasons when consenting to a request for suspension or reduction of the penalty in order to provide additional clarity and assurance that its recommendation is properly grounded. Of course, the Government remains free to enter into settlements with future Respondents, either with regard to its claim for a statutory penalty or of the entire case.

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real or personal property owned by Respondents pursuant to D.C. Code § 6-2713(i), and the sealing of Respondents' business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ **6/28/01**

John P. Dean
Administrative Judge